Subject Index

	Page
Foreword	1
The facts	2
Argument	4
1. The challenged decision of the Supreme Court of California (in effect affirming the decision of the State Court of Appeal) did not either involve a "federal question of substance not heretofore determined by this court"; or conflict in any way "with applicable decisions of this court"	4
(a) No substantial federal question was presented to or decided by the State Supreme Court	4
(b) The action of the state courts in this case constituted an exercise of powers existing under state law and practice, and did not give rise to any federal question	11
2. The fact that venue of this case was properly laid in the trial court did not affect, or prevent, the application here of the principle of forum non conveniens	14
Conclusion	19

Table of Authorities Cited

Cases	Pages
A.T. & S.F. Ry. Co. v. District Court (Okla., 1956) 298 P.2d 427, cert. den. 352 U.S. 879	12
Baltimore & Ohio Ry. Co. v. Kepner (1941) 314 U.S. 44	8, 9
Broderick v. Rosner (1935) 294 U.S. 629	11
C. & O. Ry. Co. v. Donovan (1954) 30 Ill.2d 178	12
C.R.I. & P.R. Co. v. Riederer (Mo., 1970) 454 S.W.2d 36	13
Douglas v. N.Y., N.H. & H. R. Co. (1929) 279 U.S. 377	11
Elliott v. Johnson (1956) 365 Mo. 681	13
Giles v. Western Air Lines (1947) 73 F.Supp. 616	13
Gonzales v. A.T. & S.F. Ry. Co. (1962) 189 Kan. 699	12

Pages

Goodwine v. Superior Court (1965) 63 C.2d 481.....12, 18
Gore v. U.S. Steel Corp. (1954) 15 N.J. 301, cert. den. 348 U.S. 861 13
Gulf Oil Co. v. Gilbert (1947) 330 U.S. 501.....11, 12, 14, 15, 17

Johnson v. C.B. & Q. Ry. Co. (1954) 243 Minn. 58..... 12

Koster v. Lumbermens Mutual Co. (1947) 330 U.S. 518... 13

Leet v. Union Pacific Ry. Co. (1944) 25 C.2d 605..... 7
Leonard v. Vicksburg, S. & P. R. Co. (1903) 198 U.S. 416 10

Miles v. Illinois Central R. Co. (1941) 315 U.S. 698..... 8, 9
Minneapolis etc. R. Co. v. Merrick (1929) 254 U.S. 376... 10
Missouri v. Mayfield (1950) 340 U.S. 1.....5, 6, 9, 12

Parsons v. Chesapeake & Ohio R. Co. (1963) 375 U.S. 71, 11 L.Ed.2d 991 ..... 9, 10
Price v. A.T. & S.F. Ry. Co. (1954) 42 C.2d 577, 259 P.2d 664, 43 A.L.R.2d 756, cert. den. Oct. 14, 1954, 348 U.S. 839, 99 L.Ed. 661.....passim
Pope v. A.C.L. R. Co. (1953) 345 U.S. 379..... 8, 9

Rini v. N.Y.C. R. Co. (1968) 429 Pa. 235, 240 A.2d 372 13

Southern Ry. Co. v. McCubbins (Fla.App., 1967) 196 So.2d 512 13

Thompson v. Continental Ins. Co. (1967) 66 C.2d 738....13, 18

Utley v. St. Petersburg (1923) 292 U.S. 106..... 10

Williams v. North Carolina (1942) 317 U.S. 287..... 11

Statutes

California Code of Civil Procedure:
Section 400 .....14, 16
Section 410.30 15

28 U.S.C. 1404(a)..... 11

Federal Employers Liability Act (F.E.L.A.) (46 U.S.C.A. 56).....passim

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1970

No. 1300

ELEANOR V. CURTIS, as Administratrix of the Estate of George F. Gibson, Deceased, etc.,
Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF ALAMEDA,
Respondent,

GREAT NORTHERN RAILWAY COMPANY, a corporation,
Respondent, (Real Party in Interest).

BRIEF FOR GREAT NORTHERN RAILWAY COMPANY, RESPONDENT AND REAL PARTY IN INTEREST, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

FOREWORD

The instant petition represents the *third* attempt of petitioner's counsel, following *two* prior failures, to obtain from this Court a writ to review a judgment of dismissal, on grounds of inconvenient forum, entered in an "imported" case brought in the Superior Court of California pursuant to the Federal Employ-

ers Liability Act ("FELA"). The earlier of these two prior cases was *Price v. A.T.&S.F. Ry. Co.* (1954), 42 C.2d 577 (cert. denied, Oct. 11, 1954, 348 U.S. 839). The later case was *Farmer v. Great Northern Ry. Co.*, in which judgment of dismissal, *forum non conveniens*, was entered by the Superior Court on November 3, 1969, and review of the judgment, on petition for hearing after denial of mandate, was denied by the Supreme Court of California by order (without opinion) on December 23, 1969. The petition to this Court for certiorari in *Farmer* was denied, without opinion or dissent, by order entered April 6, 1970 (397 U.S. ___, 25 L.ed.2d 532).

THE FACTS

The essential facts of this case are sufficiently stated in the opinion of the Court of Appeal of California for the First Appellate District (now officially reported, 12 C.A.3d 105), a copy of which opinion is annexed as Exhibit B to the petition: see pp. vi and vii of Exhibit B.

Petitioner does not appear to challenge the Court's statement, except for the gratuitous (and wholly erroneous) assertion (her brief, p. 2) that she had "made an uncontradicted showing of clear liability so that no convenience of defense witnesses was shown to be in any way involved as to liability." The fact is that no such showing, uncontradicted or otherwise, was made by petitioner at any stage of the case. To the contrary, Great Northern has contended at all

times, and still contends, that it was wholly free of negligence (and thus of liability) in connection with the accident upon which the suit was based; and, if an action predicated upon that accident is commenced and tried in a "convenient forum" (e.g., a competent Court in the State of Washington), Great Northern will be prepared to and will call as many as are available of the ten (or more) witnesses referred to in the opinion of the Court of Appeal.

The essential similarity of this case to the *Farmer* case is shown when the facts of the two cases are considered and the petitions for review and the supporting briefs in the two cases are compared.

Both cases involve alleged injuries suffered by operating employees of Great Northern. Both employees resided at or near Spokane, Washington. The widow of the employee (George F. Gibson), whose accidental death gives rise to the case at bench, still resides at Spokane. Farmer's alleged accident occurred at a station (Thama, Idaho) on Great Northern's main line, some 60 miles east of Spokane, Washington. Gibson's accident occurred at or near a station (Stratford, Washington) on the same main line, some 60 miles west of Spokane.

The same counsel who represented Farmer at all stages of that case also represents the petitioner in the case at bench. The same counsel also represented the plaintiff (who petitioned this Court for certiorari) in the *Price* case, supra.

To emphasize further the similarities, the essential contention here presented (p. 34 of petitioner's brief)

is verbatim from the language used in *Farmer* (p. 28 of petitioner's brief therein); namely, that "there is no statutory or other authority for a state court to dismiss an F.E.L.A. action brought under §6 of the Act."

Moreover, petitioner's brief in the case at bench resembles, in major part, the corresponding brief in *Farmer;* and in fact *exactly reproduces* much of that brief, line for line and word for word. Attached hereto, as Appendix A, is a listing of the pages, or portions thereof, of the two briefs which are either identical, or so nearly so as to be virtually equivalent. In summary, about two-thirds of the "argument" in petitioner's brief is no more than a repetition of the "argument" unsuccessfully advanced in *Farmer.*

ARGUMENT

1. THE CHALLENGED DECISION OF THE SUPREME COURT OF CALIFORNIA (IN EFFECT AFFIRMING THE DECISION OF THE STATE COURT OF APPEAL) DID NOT EITHER INVOLVE A "FEDERAL QUESTION OF SUBSTANCE NOT HERETOFORE DETERMINED BY THIS COURT;" OR CONFLICT IN ANY WAY "WITH APPLICABLE DECISIONS OF THIS COURT."

(a) No substantial federal question was presented to or decided by the State Supreme Court.

Notwithstanding petitioner's persistent efforts to blur the issues presented here by insisting throughout her petition that the basic question here is whether *venue* of her action was properly laid, the real question is whether a state court, admittedly having *venue* of an action, *must retain and decide* that action, even though the facts presented demonstrate that that

court is not a "convenient forum", and that a greatly more "convenient" (and equally adequate) forum is available to the plaintiff.

The essence of the question presented here is whether the principle of *forum non conveniens* may be applied by a state court, in an action filed in that court, even though that action purports to be predicated upon the F.E.L.A.

That very question was presented to and decided by this Court in *Missouri v. Mayfield* (1950), 340 U.S. 1, in which it was said (at pp. 4-5):

> "A State may reject the doctrine of forum non conveniens in suits under the Federal Employers Liability Act because it may deem itself compelled by federal law to reject it. Giving the opinion of the Supreme Court of Missouri in these cases a scope most favorable to reliance on a non-federal ground, doubt still remains whether that Court did not deem itself bound to deny the motions for dismissal on the score of forum non conveniens by its view of the demands of our decisions in Baltimore & Ohio R. Co. v. Kepner, 314 US 44, 86 L ed 28, 62 S Ct 6, 136 ALR 1222, and Miles v. Illinois Cent. R. Co. 315 US 698, 86 L ed 1129, 62 S Ct. 827, 146 ALR 1104.
>
> But neither of these cases limited the power of a State to deny access to its courts to persons seeking recovery under the Federal Employers Liability Act if in similar cases the State for reasons of local policy denies resort to its courts and enforces its policy impartially, see McKnett v. St. Louis & S.F.R. Co. 292 US 230, 78 L ed 1227, so as not to involve a discrimination against Employers Liability Act suits and not to offend

against the Privileges-and-Immunities Clause of the Constitution. No such restriction is imposed upon the States merely because the Employers Liability Act empowers their courts to entertain suits arising under it. There was nothing in that Act even prior to Section 1404 (a) of the 1948 revision of the Judicial Code, Title 28, USC, which purported to 'force a duty' upon the State courts to entertain or retain Federal Employers Liability litigation 'against an otherwise valid excuse.' Douglas v. New York, N.H. & H.R. Co., supra (279 US at 388, 73 L ed 752, 49 S Ct 355). Therefore, if the Supreme Court of Missouri held as it did because it felt under compulsion of federal law as enunciated by this Court so to hold, it should be relieved of that compulsion. It should be freed to decide the availability of the principle of forum non conveniens in these suits according to its own local law. To that end, we vacate the judgment of the Supreme Court of Missouri and remand the cause to that Court for further proceedings not inconsistent with this opinion."

Shortly following *Mayfield*, the *Price* case, supra (*Price v. A.T.&S.F. Ry. Co.* (1954), 42 C.2d 577, 43 A.L.R.2d 756) came before the Supreme Court of California. The *Price* case was very similar to the case at bench, and was therefore properly cited herein and relied upon by the Court of Appeal (its opinion, Exhibit B to petitioner's brief, pp. x, xi, xii, xiv).

In *Price*, the plaintiff, an employee of the defendant railroad (The A.T.&S.F. Ry. Co.), was a resident of New Mexico. While so employed he was allegedly injured in accidents occurring in that state. The defend-

ant railroad was (and is) a Kansas corporation with extensive operations, including important headquarters offices in both New Mexico and California. Price's action, under the F.E.L.A., was brought in the Superior Court of California for Los Angeles County.

The defendant railroad in *Price* moved for dismissal on grounds of *forum non conveniens*. The motion was granted by the trial court and judgment was duly entered; but, upon appeal to the State Appellate Court, that judgment was reversed (259 P.2d 664). The defendant railroad then petitioned the Supreme Court of California to hear the case, and upon such hearing, the judgment of dismissal rendered by the trial court was affirmed.

In the Supreme Court of California, Price (who was represented at all stages by the same counsel who represented Farmer in his recent case, and who now represents the petitioner in the case at bench) advanced the same contention now made in the instant petition; namely, that he had "an absolute right" to have his case *retained* and *tried* in the Court of his choice in California once *venue* was established pursuant to Section 56 of the F.E.L.A. (v. 42 C.2d, p. 586; and compare pp. 4-5, 32-35, of petitioner's brief herein).

In the *Price* opinion the Supreme Court of California referred to its earlier decision in *Leet v. Union Pacific Ry. Co.* (1944), 25 C.2d 605, in which it had held that in F.E.L.A. cases brought in California there was "no room" for the doctrine of *forum non conveniens*, saying (42 C.2d pp. 583-584):

"The Lest case, discussed hereinabove, appears to have presented the first instance in which the doctrine of forum non conveniens has been considered and discussed by this court, and as already mentioned we rejected it in connection with the FELA litigation there involved because of our belief that we were so compelled by the decision of the United States Supreme Court in the Miles case. But since that court, in the Mayfield case, has now lifted that compulsion (if it ever intended any), we perceive no reason why the doctrine should not be available in this state, upon a proper showing and without discrimination against either non-citizens of California or against FELA cases."

In due course, Price filed in this Court his petition for certiorari to review the decision of the Supreme Court of California (No. 180, October Term, 1954). As previously stated, that petition was denied, without opinion (October 14, 1954; 348 U.S. 839, 99 L.ed. 661).

In the petition to this Court in the *Price* case, and again in the petition last year (1970) in the *Farmer* case, primary reliance was based upon certain decisions of this Court which are again cited here and asserted to support the present petition (see pp. 5, 7, 8, 9-10, 24-25, 32, 34);

Baltimore & Ohio Ry. Co. v. *Kepner* (1941), 314 U.S. 44;

Miles v. *Illinois Central R. Co.* (1941), 315 U.S. 698;

Pope v. *A.C.L. R. Co.* (1953), 345 U.S. 379.

It was then Price's basic argument, and similarly it was later strenuously contended by Farmer, that by these decisions the rule was established that a plaintiff in an F.E.L.A. case has an *absolute right* to select *any* forum in which *venue* can be laid, and that this selection cannot be defeated or disturbed on the ground of *forum non conveniens*.

The conclusive answer to this contention, which was declared and given effect in *Mayfield* (by this Court, 340 U.S., at pp. 4-5) and *Price* (by the Supreme Court of California, 42 C.2d, at pp. 581-582, following *Mayfield*), is that neither *Kepner* nor *Miles* forbids the application of *forum non conveniens* in an F.E.L.A. action. The same is equally true so far as concerns *Pope*, inasmuch as this Court denied review in *Price*, and again later in *Farmer*, although in both cases, the *Pope*, *Kepner* and *Miles* decisions were cited and relied upon by the petitioners in virtually the same connotation.

The propriety of a dismissal of an F.E.L.A. case on grounds of inconvenient forum by the State Court in which the case was filed was also recognized by this Court in *Parsons v. Chesapeake & Ohio R. Co.* (1963) 375 U.S. 71, in which this Court compared the "discretionary determinations" required in state and federal courts in cases in which motions invoking this principle are presented. It appeared, in *Parsons*, that an F.E.L.A. action had been dismissed on this ground, by the State Court (at Chicago) in which it had been filed; and thereupon an identical action was filed in the Federal Court at Chicago. The latter Court held

that the State Court's dismissal was not conclusive upon the Federal Court in the federal action; but did not hold, or even suggest, that the State Court did not have power, or that it erred otherwise, in acting as it did in the state action; and seemingly no such contention was made by either party in this Court: see pp. 991-992 of 11 L.ed.2d, where the briefs of the parties are summarized.

This Court has consistently held that no *substantial* federal question is presented which requires or warrants review by this Court when that very question has been settled by prior decisions. *Leonard* v. *Vicksburg, S. & P. R. Co.* (1903), 198 U.S. 416; *Minneapolis etc. R. Co.* v. *Merrick* (1920) 254 U.S. 376; *Utley* v. *St. Petersburg* (1923) 292 U.S. 106.

Bypassing temporarily the question whether *any federal* question at all is presented when the only question really involved is whether a trial court of a state has been properly required, by order of a competent court of appeal of that state, to dismiss an F.E.L.A. complaint on grounds of inconvenient forum, it is clear that the federal question thus presented (if any) is not "substantial." That question, to the extent any federal implications are involved, has been fully considered and determined by this Court; and the decisions and rulings of the Supreme and Appellate Courts of California are completely in accord with the applicable decisions of this Court.

It is submitted that no basis exists for the granting of the petition upon the supposed ground that a fed-

eral question of substance is presented requiring determination by this Court.

(b) The action of the State Courts in this case constituted an exercise of powers existing under state law and practice, and did not give rise to any federal question.

In petitioner's brief reference is made to Section 1404(a) of Title 28, U.S. Code, which authorizes a federal district court to transfer an action from an inconvenient forum to a more convenient one (v. petitioner's brief, at pp. 8, 31, 32). Apparently, it is thought that in some way that statute is involved here so that it may be argued therefrom that a federal act has been applied by the State Courts; for the contention is earnestly advanced by petitioner (her brief, pp. 11-13) that "Federal Law Governs," and that "This case would not even justify transfer in a federal court," etc. (her brief, pp. 31-32).

This argument is completely misdirected. The State Courts obviously did not undertake to act pursuant to Section 1404(a). Instead, the State Court of Appeal recognized and stated the principle of *forum non conveniens*, and directed the application of that principle by the trial (Superior) Court. The principle thus applied was developed in the courts of many of the states, as well as in federal practice, long prior to the enactment (1948) of Section 1404(a): *Gulf Oil Co. v. Gilbert* (1947), 330 U.S. 501 (504-506); *Broderick v. Rosner* (1935) 294 U.S. 629 (643); *Williams v. North Carolina* (1942) 317 U.S. 287 (294); *Douglas v. N.Y., N.H. & H. R. Co.* (1929) 279 U.S. 377 (387).

In the *Mayfield* case, supra, this Court directly declared that the question whether *forum non conveniens* should be applied by a state court in an F.E.L.A. case commenced in that court was purely one of state rather than federal law, saying (340 U.S. at p. 4):

> "But if a State chooses to '[prefer] residents in access to often over-crowded courts' and to deny such access to all non-residents, whether its own citizens or those of other States, it is a choice within its own control. This is true also of actions for personal injuries under the Employers Liability Act. Douglas v. New York, N.H.&H. R. Co., 279 US 377, 387, 73 L ed 747, 751, 49 S Ct 355. Whether a State makes such a choice is, like its acceptance or rejection of the doctrine of forum non conveniens, a question of State law not open to review here."

The correctness of the decisions of the courts of review of California in the *Price* and *Farmer* cases, and thus also in the case at bench, is confirmed by not only this Court's denial of review in *Price* and *Farmer*, but also numerous decisions in the Supreme and Appellate Courts of many of the states in which similar cases have been presented:

C. & O. Ry. Co. v. *Donovan* (1954), 30 Ill.2d 178;

A.T. & S.F. Ry Co. v. *District Court* (Okla., 1956) 298 P.2d 427 (cert. den. 352 U.S. 879);

Gonzales v. *A.T. & S.F. Ry. Co.* (1962) 189 Kan. 689;

Johnson v. *C.B. & Q. Ry. Co.* (1954) 243 Minn. 58;

Southern Ry. Co. v. *McCubbins* (Fla.App., 1967) 196 So.2d 512;

Rini v. N.Y.C.R. Co. (1968) 429 Pa. 235, 240 A.2d 372;

C.R.I. & P.R. Co. v. *Riederer* (Mo., 1970) 454 S.W.2d 26.

Compare, also, the following cases in which *forum non conveniens* was recognized in actions other than under the F.E.L.A.:

Gulf Oil Co. v. *Gilbert*, supra;

Koster v. *Lumbermens Mutual Co.* (1947) 330 U.S. 518;

Giles v. *Western Air Lines* (1947) 73 F.Supp. 616;

Gore v. *U.S. Steel Corp.* (1954) 15 N.J. 301 (cert. den., 348 U.S. 861);

Elliott v. *Johnson* (1956) 365 Mo. 881;

Goodwine v. *Superior Court* (1965) 63 C.2d 481;

Thompson v. *Continental Ins. Co.* (1967) 66 C.2d 738.

2. THE FACT THAT VENUE OF THIS CASE WAS PROPERLY LAID IN THE TRIAL COURT DID NOT AFFECT, OR PREVENT, THE APPLICATION HERE OF THE PRINCIPLE OF FORUM NON CONVENIENS.

Petitioner, throughout her brief, attempts to treat this case in its present stage as involving primarily a question *of venue*, and much of the argument is devoted to that question. Thus, at the outset (her brief, p. 2), reference is made to "the matter of *venue*"; and, at p. 3, there is quoted in full, Section 400 of the California *Code of Civil Procedure*, which deals with procedure when a motion is made for a "change of place of trial", i.e., a change of "*venue*". Again, on p. 7, the question of "venue" of an F.E.L.A. case is argued, and similar references to "venue" are repeated at pp. 8, 9, 21, 22, 27, 28 and 29. The whole thrust of the petitioner's argument is that the F.E.L.A. not only gives to the plaintiff the right to *select* the "venue" of his action, but also compels the forum thus "selected" to *retain and decide* his action, no matter how *inconvenient* that forum may be or how much more convenient another forum equally available to him might be. This Court has squarely declared, however, that no question of *venue* (i.e., of the right to *bring* an action) is involved, or indeed relevant, when a defendant moves for the application of the principles of *forum non conveniens*, except that venue must exist, in order that the principle may be applied. In the *Gulf Oil* case, this Court said (330 U.S. at p. 504):

> "It is conceded that the venue statutes of the United States permitted the plaintiff to *commence* his action in the Southern District of New

> York and empower that court to *entertain* it. But that does not settle the question whether it *must* do so. Indeed, the doctrine of forum non conveniens can never apply if there is absence of jurisdiction or mistake of venue. . . ." (Emphasis added).

This expression was cited and relied upon by the Supreme Court of California in the *Price* opinion (42 C.2d, at pp. 580-581), and again by the Court of Appeal in the opinion in the case at bench: v. pp. vii, viii, of Exhibit B to the petitioner's brief herein.

The heavy emphasis placed by petitioner upon *venue* in this case is obviously for the purpose of supporting her argument that the effect of the decision here challenged was in some way to deny to F.E.L.A. plaintiffs (and herself in particular) the right to "bring" (or "commence") such actions in the state courts of California, while permitting other types of cases to be freely brought in those courts. The argument is wholly misplaced and irrelevant. The principle of *forum non conveniens* does not restrain or impede the *commencement* of actions of all kinds, including those under F.E.L.A., in which *venue* exists. This principle can and does apply only in an individual case (whether under F.E.L.A., or otherwise) where the facts demonstrate that it would not be convenient to *retain* and *try* the case in the court where it was brought, and would be convenient so to do in another court of competent jurisdiction. As this Court said in the *Gulf Oil* opinion (at pp. 506-507):

> "In all cases in which the doctrine of forum non conveniens comes into play, it presupposes at

> least two forums in which the defendant is amenable to process; the doctrine furnishes criteria for choice between them."

The fallacy of petitioner's argument, predicated upon considerations of venue, is apparent at the very outset of her brief, where, as already noted, she refers to and quotes Section 400 of the California Code of Civil Procedure, and asserts that Great Northern's application for mandate, presented to the California Court of Appeal, was made pursuant to that section.

The wording of Section 400 makes clear that it deals only with procedure following the granting (or denial) of a motion in the trial court "to change the place of trial" of an action pending there. No such motion was made by Great Northern in the case at bench; no question of "place of trial" (i.e., of "venue") was ever raised. The motion in the trial court was specifically, and solely, for *dismissal* on the ground of inconvenient forum, and was of the same precise character as the motions which were granted in the *Price* and *Farmer* cases.

Petitioner goes to great length (her brief, pp. 14-26) to argue her contention (brief, p. 24) that "to say that an F.E.L.A. non-resident plaintiff cannot sue a defendant corporation doing business in California when every other non-resident creditor on every other debt has a right to bring such an action" is "obviously a denial of the privileges and immunities of the citizens of other states." The simple and complete answer to this contention is that Great Northern has not as-

serted, and the California Courts have not held even by implication, that an F.E.L.A. non-resident plaintiff may not sue a non-resident defendant doing business in California. In fact, in the opinion now attacked by petitioner, it is said (Exhibit B to the petition, pp. vii-viii) that:

> "It is conceded that under the F.E.L.A. an action may be filed in any state where a defendant railroad company 'resides', or where the cause of action arose, or in which it may be doing business at the time of the commencement of the action (Title 45 U.S.C., §56). Since Great Northern was doing business in California at the time of the subject action, its *venue* was properly laid in that state, which became vested with *jurisdiction* over both the subject matter of the action and its parties." (Emphasis as in the original).

It is erroneous for petitioner to contend, as apparently she does (e.g., at pp. 20, 24, 32, of her brief), that California applies the principle of *forum non conveniens* in F.E.L.A. cases *only*, but declines to apply that principle in other cases. The Supreme Court of California has recognized that this principle is of general application in cases where the cause of action arose in another state, and the plaintiff or other real party in interest is a non-resident, provided also that the other criteria warranting its application (as set forth, for example, in the *Gulf Oil* opinion, 330 U.S., at pp. 507-509) are also present. In *Price*, the Supreme Court of California pointed out (42 C.2d, at p. 583) with the citation of numerous prior decisions, that:

> "It is thus clear that this state has no policy, either statutory or court made, of discrimination against either non-citizens of California or against F.E.L.A. actions in determining when a non-resident will be given access to state courts to litigate a cause of action which arose elsewhere. . . ."

This conclusion was obviously acceptable to, and accepted by, this Court, since certiorari was denied (348 U.S. 839).

In the petition for certiorari in the *Farmer* case, the same contention was again advanced (v. pp. 4, 10, 12-14 of that petition); and, as already noted, that petition was likewise denied (25 L.ed.2d 532), thus again indicating this Court's view that the petitioner's contention was without merit.

Note may also be taken of the two decisions of the State Supreme Court, rendered subsequently to *Price*, and already cited herein, which demonstrate that in California the doctrine of *forum non conveniens* is not limited in its application to F.E.L.A. cases brought by or for the benefit of non-residents. In *Goodwine* v. *Superior Court*, supra, the Court held (63 C.2d, at p. 485) that *forum non conveniens* "is accepted in this jurisdiction (citing *Price*), and applies to actions for support" (citations). In *Thompson* v. *Continental Ins. Co.*, supra, the Court referred (66 C.2d, at pp. 742-744) to both *Price* and *Goodwine*, and cited various typical cases in the several states, and in the federal courts, in which the doctrine has been widely recognized.

The general application of the doctrine in California, without limitation to F.E.L.A. cases only, is evidenced further by the recent (1970) enactment of Section 410.30 of the California Code of Civil Procedure (quoted by the Court of Appeal; Exhibit B to the petition, at p. x). It will be noted that this statute may be employed in any pending action, of whatever type, in which it is found "that in the interest of substantial justice (the) action should be heard in a forum outside this state."

It is clear that in California, as elsewhere in the courts of the United States and most, if not all of the states, *forum non conveniens* is an accepted principle, which is applied where the relevant facts so warrant, and without discrimination either for or against F.E.L.A. plaintiffs.

CONCLUSION

The petitioner's brief herein is distinctive, not so much for its content (which is almost entirely irrelevant), as for its omissions.

The first conspicuous omission consists of the failure to discuss the *Price* decision or even to mention that case except (a) in passing (pp. 12, 27), (b) to characterize the case as "poorly considered" (p. 32), and (c) to quote the *dissenting* opinion in part (pp. 32-33).

The second omission consists of the petitioner's complete failure to mention the *Farmer* case, notwithstanding that that case was before this Court only last year, and involved facts and issues virtually identical with those presented here, particularly so far as concerned the doctrine of *forum non conveniens*. Petitioner cannot claim that she is not familiar with *Farmer*; as noted, the same counsel who represent her in this case also represented the plaintiffs in both *Price* and *Farmer*.

The third, and most outstanding, omission consists of petitioner's failure to discuss, or again even to mention, the several factual considerations enumerated in the opinion of the Court of Appeal (Exhibit B, at pp. xv-xviii) as determining whether in this or any other case *forum non conveniens* should be applied. It is thus in effect conceded by petitioner (as indeed it has been so conceded at all the earlier stages of this case) that if this were other than an F.E.L.A. case, there would be no question but that *forum non conveniens* should apply.

As emphasized previously, this is the *third* attempt, by the same counsel, to persuade this Court to review decisions of the higher courts of California in which dismissals of imported F.E.L.A. cases were held to be appropriate. Both of the earlier petitions were denied (*Price*, 348 U.S. 839; *Farmer*, 397 U.S. ....., 25 L.ed. 2d 532). The later of these denials (in *Farmer*) took place on April 6, 1970, less than one year ago.

No persuasive reason is urged for the reversal of these prior determinations. It is submitted that the petition should therefore be summarily denied.

Dated, Oakland, California,
February 24, 1971.

Respectfully,
BURTON MASON,
Attorney for Respondent
(Real Party in Interest),
Great Northern Railway Company.

CROSBY, HEAFEY, ROACH & MAY,
PROFESSIONAL CORPORATION,
Of Counsel for Respondent
(Real Party in Interest),
Great Northern Railway Company.

(Appendix A Follows)

Appendix A

The following is a list of close resemblances between petitioner's brief herein to and the corresponding brief in *Farmer* v. *Great Northern Ry. Co.*, No. 1229, October Term, 1969 (cert. denied, 4-6-70, 25 L.ed.2d 532). This list is illustrative, but not all-inclusive:

1. The topic "Jurisdiction", at p. 4, and the following discussion, to the end of the first paragraph on p. 5, is virtually word-for-word the same as the corresponding topic and discussion on pp. 5-6 of the *Farmer* brief.

2. The discussion and citations at the center of p. 6, and continuing to the center of p. 8, are identical with pp. 5, 6 and the top of p. 7 of the *Farmer* brief.

3. The topical heading on p. 8 is the same as the heading on p. 7 of the *Farmer* brief; the discussion which follows, on pp. 8 down to the center of the page, virtually reproduces the discussion on p. 7 and the top of p. 8 of the *Farmer* brief.

4. The topical heading on p. 11, and all of the following discussion on pp. 11, 12, 13, 14, 15, 16 and the upper two-thirds of p. 17, are identical with the content of the *Farmer* brief, commencing with the heading on p. 8 of that brief, and continuing to the center of p. 14.

5. The topical heading at the top of p. 27 and all of the following discussion extending to the foot of p. 29, including the second heading on p. 27, are an exact reproduction of the portion of the *Farmer* brief commencing in the center of

p. 18, and continuing to and including the six lines at the top of p. 21.

6. The topical heading at the foot of p. 29, and the following discussion to and including the eleven lines at the top of p. 31, are equally an exact reproduction of the heading near the foot of p. 14, and the following discussion on pp. 14 and 15 of the *Farmer* brief.

7. The topical heading on p. 31, and the discussion under that heading on pp. 31 and 32, are again an exact reproduction of the lower three-quarters of p. 21 of the *Farmer* brief.

8. The citation of and quotation from the dissenting opinion in the *Price* case, at pp. 32-33 reproduces the similar quotation on p. 24 of the *Farmer* brief.

9. Some 55 decisions of this Court, the United States Courts of Appeal and District Courts, and the various state courts, are cited in the brief herein. Thirty-three of these decisions were cited in the *Farmer* brief, almost without exception in the same context as in the brief in this case.

In summary, 17 of the 27 pages of argument in the petitioner's brief herein (bottom of p. 4 through p. 31 inclusive) are either verbatim or exceedingly close reproductions of the corresponding portions in the brief of the *Farmer* case, which was filed by the same counsel less than one year ago.